

reverse the ALJ's Order and deny the claim for failure to make timely written notice of the alleged occupational disease.

The claimant argues he notified not only the human resources manager but also his supervisor and lead man that exposure to chemical fumes was causing him difficulties. Accordingly, claimant argues respondent had actual knowledge of his disablement and its relation to work. In the alternative, claimant argues the ALJ's finding that he provided timely written claim within 90 days of learning the cause for his disablement should be affirmed.

The sole issue to be considered on appeal is whether claimant provided timely written notice of an occupational disease.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Michael Shelton began working for Universal Products, Inc., on March 24, 2003, as a screen printer. In the performance of his job he worked with chemicals such as acetone, acetate, methylethylketone as well as thinners for the Klear-Kote. He also noted that a chemical used as a screen cleaner, which he called LV, had a particularly strong odor. Although he had worked with many of these chemicals while employed for a previous employer he noted the screen cleaner used working for respondent was not one he had used in his previous employments. He testified he did not have any lung problems while working for his previous employer.

Claimant began having a constant cough in November 2003 which he treated with over-the-counter medicines. Claimant finally sought treatment at the Veteran's Administration (VA) in February 2004. Claimant missed some work and when finally released to return to work he testified he told Fred Pavey, respondent's human resources director, that he had been diagnosed with bronchitis. Claimant provided Mr. Pavey with some of his VA medical records regarding the treatment he had received for his bronchitis and to verify why he had missed work.

Claimant testified he told Mr. Pavey that working around the chemical fumes caused problems with his bronchitis. Claimant testified that Mr. Pavey asked if claimant would like to transfer to a different department where the fumes were not as strong but claimant declined because he felt the fumes were the same throughout the building.

As claimant continued working in March 2004, he testified that on several occasions he had told his supervisor the chemical fumes were bothering him and he had to leave work early. Claimant testified he also told his lead worker the fumes were causing him to be unable to breathe.

Claimant last worked for respondent on March 10, 2004. He described having trouble breathing because of the fumes and told his supervisor he was leaving because of the problem. Claimant never again contacted respondent until June 24, 2004, when he gave respondent a Written Claim for Compensation.

Mr. Pavey testified he was not aware claimant was making a work-related claim for his pulmonary disease until June 24, 2004. He agreed claimant had provided him with the VA medical records in March 2004 but he could not recall if he had read them and upon reviewing them at the hearing concluded they did not indicate the diagnosed bronchitis was caused by work. Mr. Pavey agreed claimant had been offered a different job to work because it was a new job on the same shift that claimant worked but claimant declined because it did not pay the same. And Mr. Pavey later noted that if claimant had mentioned problems with chemical fumes he would have concluded claimant's condition was work-related, and claimant did not.

Leslie S. Hays, claimant's supervisor, testified he had known claimant for 20 years and had worked with claimant for other employers. Mr. Hays noted claimant was a heavy smoker and had a hacking cough. Mr. Hays testified claimant never told him that chemical fumes were causing him any problems. Mr. Hays recalled claimant's last day at work and recounted how claimant had told him that he did not feel well and wanted to go home. Mr. Hays denied claimant had ever said he was having breathing problems because of the chemical fumes at work.

Roland E. Goldwater, lead worker, testified he had known claimant for approximately 10 years. Mr. Goldwater noted he had observed claimant in the smoking break area in March 2004. Mr. Goldwater testified claimant never reported he was having respiratory problems from exposure to chemical fumes.

Claimant testified he told the respondent's human resources manager, his supervisor and the lead worker that chemical fumes at work were causing him to have difficulty breathing. All three individuals denied claimant ever made such complaints. The ALJ concluded that when claimant returned to work in March 2004 he had told respondent that he had bronchitis but that none of the parties associated that condition with his exposure to chemicals at work. The Board agrees that when claimant returned to work and provided Mr. Pavey with the VA medical records he was merely providing those documents to explain his absence from work. And he then returned to work.

As noted above, there is some conflicting testimony in this case. The claimant as well as respondent's human resources manager, claimant's supervisor and a lead worker all testified in person before the ALJ. There is contradictory testimony regarding whether claimant complained that chemical fumes at work were causing him respiratory problems. Thus, credibility is at issue. The ALJ had the opportunity to assess the witnesses' demeanor. In this case, the ALJ did not believe the claimant and specifically determined respondent was not provided notice of a connection between claimant's bronchitis and

work. Under this circumstance, where conflicting testimony exists, the Board finds some deference should be given to the ALJ's evaluation of the witnesses' credibility. The Board, therefore, taking into consideration the ALJ's opportunity to assess the witnesses' credibility, affirms the ALJ's decision that claimant failed to provide notice in March 2004 that he was alleging a work-related connection between his pulmonary condition and work nor that respondent had actual knowledge.

The respondent argues claimant did not make timely written notice of his occupational disease and respondent did not have actual knowledge of his disablement.

K.S.A. 44-5a17 requires written notice of occupational disease be given to the employer within 90 days of disablement. K.S.A. 44-5a04 defines disablement as the employee becoming actually incapacitated, partially or totally, from performing the employee's work. In this instance, claimant's written notice was not in respondent's possession until June 24, 2004, which is more than 90 days beyond claimant's last date of employment of March 10, 2004.

K.S.A. 44-5a17 goes on to state, however, that:

Actual knowledge of such disablement, by the employer in whose employment the employee or workman was last injuriously exposed, or by the responsible superintendent or foreman in charge of the work, shall be deemed notice within the meaning of this section.

As previously noted, the ALJ concluded respondent's employees were not informed that claimant was alleging a connection between his bronchitis and his work. The Board agrees that when claimant returned to work and provided Mr. Pavey with the VA medical records he was merely providing those documents to explain his absence from work. This did not provide respondent with actual knowledge of disablement.

The Board further finds claimant's testimony established that he was aware of the connection between his pulmonary condition and work in March 2004 instead of the June date relied upon by the ALJ. Claimant testified his respiratory problems were caused by his work because that is what his doctor told him in March 2004.²

As claimant's written notice was more than 90 days beyond his date of disablement, which was the day after his last day worked, he did not give notice within 90 days as required and the claim should, therefore, be denied.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Thomas Klein dated March 29, 2005, is reversed.

² P.H. Trans. at 34.

IT IS SO ORDERED.

Dated this 30th day of June 2005.

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director